INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	1
Standard contract provisions and statutes involved	2
Statement	3
Discussion	5
Conclusion	10
Appendix	11

CITATIONS

Cases:	
Baltimore & Ohio R. R. v. *United States*, 261 U. S. 592	9
Bowles v. *Willingham*, 321 U. S. 503	6
Filor v. *United States*, 9 Wall. 45	9
Horowitz v. *United States*, 267 U. S. 458	8
Maxwell v. *United States*, 3 F. 2d 906	8
New England Tree Expert Co. v. *United States*, 69 F. Supp. 396	8
Ross Electric Construction Co. v. *United States*, 111 C. Cls. 644	8
United States v. *Cowden Mfg. Co.*, 312 U. S. 34	6, 7, 8
United States v. *Glenn L. Martin Co.*, 308 U. S. 62	7, 8
United States v. *North American Co.*, 253 U. S. 330	9
Whiteside v. *United States*, 93 U. S. 247	9
Statutes:	
Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App. 901 seq	3
Section 2 (a)	12
Section 4 (d)	6
Miscellaneous:	
1 CCH *Government Contracts*, Para. 18305	9
41 C. F. R. 11.3	3
Executive Order 6166, June 10, 1933	3
Federal Supply Service Circular No. 13, dated April 18, 1950	9
O. P. A. Supplemental Order No. 164, dated June 6, 1946, 11 F. R. 6301	3, 6
Section 1	11
Section 6	11
Section 7	11
United States Standard Form 33 of Public Contracts, approved March 30, 1936, 41 C. F. R. 12.33, Paragraph 6	2, 4, 5, 6, 7, 9

905140—50

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 234

CHARLES W. KELLY, TRADING AND DOING BUSINESS AS KELLY DAIRIES, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 7–16) is reported at 91 F. Supp. 305.

JURISDICTION

The judgment of the Court of Claims was entered on June 5, 1950 (R. 16). The petition for a writ of certiorari was filed on August 3, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

1. Whether an OPA order permitting a supplier to increase his prices to a contractor was

an "adjustment charge" or "other * * * charges * * * imposed * * * by the Congress * * * and made applicable directly upon the production, manufacture, or sale" of an article within the meaning of the standard form of public contract then in use, entitling the contractor to an increase over bid prices.

2. Whether the United States was bound by an unauthorized statement by an officer receiving bids that the contract provisions provided for an increase based on adjustments of OPA ceiling prices.

STANDARD CONTRACT PROVISIONS AND STATUTES INVOLVED

Paragraph 6 of the United States Standard Form 33 of Public Contracts (approved March 30, 1936) reads as follows:

> 6. Prices bid herein include any Federal tax heretofore imposed by the Congress which is applicable to the material on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of this bid, and made applicable directly upon the production, manufacture, or sale of the supplies covered by this bid, and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly, and any amount due the contractor as a result of such change

will be charged to the Government and entered on vouchers (or invoices) as separate items.[1]

The pertinent provisions of OPA Supplemental Order 164, dated June 6, 1946 (11 F. R. 6301) and of the Emergency Price Control Act of 1942 (56 Stat. 23, as amended, 50 U. S. C. App. 901, *et seq.*) are set forth in the Appendix, *infra*, pp. 11, 12.

STATEMENT

The petitioner, who had been awarded a contract for the delivery of dairy products to a Veterans' Administration hospital, brought suit in the Court of Claims on September 15, 1948 (R. 1–3) for $3,292.75, representing an increase, over the bid price of the products, which petitioner paid his suppliers who had raised their prices after the issuance of a supplemental OPA regulation permitting sellers of dairy products to increase their prices.

Petitioner was engaged in the wholesale and retail dairy business at Fayette County, Lexington, Kentucky. He submitted a bid to supply milk and other dairy products to a Veterans' Administration hospital for the period of May 15, 1946 through June 30, 1947. The bid was made

[1] This was one of the standard forms approved by the Secretary of Treasury and issued to all government agencies pursuant to 41 C. F. R. 11.3. The functions of standardizing procurement policies and methods were transferred to the Federal Bureau of Supply in the Treasury Department by Executive Order 6166, June 10, 1933.

on United States Standard Form 33 which contained Paragraph 6, *supra* (R. 4). The bids were opened by an official designated as "Chairman of the Board of Awards," who was not the contracting officer, and whose sole authority was to receive the bids and to award the contract to such person as had bid according to the specification (R. 5, 10). Two unsuccessful bidders specified that their prices were to be adjusted in the event OPA raised the ceilings, but petitioner's bid contained no such clause (R. 5). In the course of the opening of the bids, the Chairman indicated his opinion that bid prices could be adjusted to meet OPA orders under the provisions of Paragraph 6 of the standard contract (R. 5).

The contract was awarded to petitioner, and subsequently the contracting officer of the hospital executed the certificate of award. This official had no conversations with petitioner concerning the contract (R. 5–6).

Subsequently, the OPA issued its Supplemental Order No. 164 (R. 6; Appendix, *infra,* p. 11) which permitted sellers of dairy products to increase their prices by designated amounts. Petitioner's suppliers increased their prices accordingly and, having paid his suppliers the increase, petitioner sought the amount of the increase from the hospital authorities. The increases were paid from June 1946 to June 1947. However, on July 24, 1947, the Finance Officer of the hospital no-

tified petitioner that the increases constituted overpayments; and the sum of the increases was deducted from the current amount due petitioner for the month of June 1947, the last month of the contract (R. 6–7). Plaintiff submitted a reclaim voucher, which was rejected by the Comptroller General (R. 7), and suit followed.

Petitioner contended in the Court of Claims: (1) That OPA Supplemental Order 164, permitting sellers to increase the price of certain dairy products, was a charge imposed by Congress and made directly applicable upon the sale of an article within the meaning of Paragraph 6, and (2) that petitioner was entitled to rely upon the statement of the Chairman of the Board of Awards that in his opinion Paragraph 6 permitted an increase based on an adjustment of OPA ceiling prices. The Court of Claims rejected the first contention on the ground that Paragraph 6 referred only to charges in the nature of a tax (R. 9–10). It refused petitioner relief on the second ground for lack of any evidence that the Chairman of the Board of Awards was authorized to alter the meaning of Paragraph 6 (R. 10–13).

DISCUSSION

1. The decision below is free from error and provides a correct guide to the meaning of the term "charge" in Paragraph 6 of Standard Form 33. Since the term "charge" has many

possible meanings, its meaning in a particular contract is determined by the context in which it appears. The first sentence of Paragraph 6 states "Prices bid herein include any Federal tax heretofore imposed by the Congress which is applicable to the material on this bid" and the term "charge" is then used in the phrase "any sales tax, processing tax, adjustment charge, or other taxes or charges * * * imposed * * * by the Congress" (*supra*, p. 2). On its face, Paragraph 6 discloses its specific purpose as a "federal taxes" clause, and therefore the context in which it is used limits its meaning to a charge in the nature of a tax. *United States* v. *Cowden Mfg. Co.*, 312 U. S. 34.

OPA Supplemental Order No. 164 simply permits sellers of certain dairy products to increase their prices above the amount of the prior regulation (Appendix, *infra*, p. 11). A maximum price ceiling is not a price set by Congress for the purchase of an article, but rather a maximum limit upon the price which private sellers may charge their customers. Section 4 (d) of the Emergency Price Control Act of 1942, 50 U. S. C. App. 904 (d). See *Bowles* v. *Willingham*, 321 U. S. 503, 517. Whether the permissive increase is demanded and received in any particular case depends upon the private contracts and other economic circumstances of the parties. The price of dairy products to petitioner was not

increased by the OPA regulation,[2] but by sellers' taking advantage of the permission granted to them by OPA to increase their prices. Therefore an OPA maximum price regulation is not a tax charge, and the adjustment of a maximum price regulation is not an "adjustment charge" within the meaning of Paragraph 6.

It is apparent that petitioner paid the increase in the price of milk, not because an act of Congress required him to do so, but by virtue of a sub-contract with his suppliers. Paragraph 6, however, provides reimbursement only for taxes or charges which are imposed by federal law directly on the contractor, not those passed on by a sub-contractor (*United States* v. *Cowden Mfg. Co.*, 312 U. S. at 36), and only taxes on the price of the contract article, not those on materials (*United States* v. *Cowden Mfg. Co., id.* at 37), or other costs of performance such as social security taxes on employees' wages (*United States* v. *Glenn L. Martin Co.*, 308 U. S. 62).

Petitioner urges that Paragraph 6 entitles him to recover for any increased costs of performance

[2] Petitioner states the question to be: "Was the order of the Office of Price Administration (issued June 7, 1946, *increasing the price of dairy products* * * *) * * * a * * * charge * * * upon the * * * sale of the supplies?" (Pet. 6); but the question properly phrased should read: "Was the order of the Office of Price Administration (issued June 7, 1946, *permitting private sellers of dairy products to increase their prices*) a charge by Congress on the sale of the supplies?" [Italics added.]

"brought about by the defendant's act" (Pet. 8). But this construction wrenches the term "charges" out of context; it is inconsistent with specific decisions on Paragraph 6, *United States* v. *Glenn L. Martin Co., supra; United States* v. *Cowden Mfg. Co., supra;* and it is contrary to the established rule that government contractors may not recover the additional costs of performance "resulting from its public and general acts as a sovereign." *Horowitz* v. *United States,* 267 U. S. 458, 461 (embargo on freight shipments); *Maxwell* v. *United States,* 3 F. 2d 906 (C. A. 4) (wartime production measures); *New England Tree Expert Co.* v. *United States,* 69 F. Supp. 396 (D. R. I.) (minimum 48-hour workweek); *Ross Electric Construction Co.* v. *United States,* 111 C. Cls. 644 (material priorities).

2. Petitioner cannot rely upon the statement of the Chairman of the Board of Awards to the effect that Paragraph 6 included permissive price increases resulting from an adjustment of an OPA maximum price regulation. The Chairman of the Board of Awards neither had nor represented that he had authority to alter the meaning of any clause in the contract (R. 5).[3] The rule

[3] Petitioner relies (Pet. 8) upon the argument of the dissenting opinion below (R. 15) that the Chairman merely interpreted the meaning of Paragraph 6; but whether his statement is called an alteration or an interpretation is beside the point that Paragraph 6 has a standard meaning which cannot be enlarged upon in a particular case except by an authorized agent.

is clearly established that the United States is not bound to an express or implied contract by any unauthorized action of a government official. *Baltimore & Ohio R. R.* v. *United States,* 261 U. S. 592, 597; *United States* v. *North American Co.,* 253 U. S. 330, 333; *Whiteside* v. *United States,* 93 U. S. 247, 256–257; *Filor* v. *United States,* 9 Wall. 45.

3. None of the questions in this case is important enough to warrant review by this Court. Paragraph 6 of Standard Form 33 is no longer in current use; it has been superseded by Paragraph 10 of Standard Form 32 issued by the General Services Administration on April 18, 1950.[4] In the new form, the tax paragraph has been rewritten to eliminate any use of the term "charges" or any key terms except taxes, tax refunds and drawbacks. There are no other cases pending involving the meaning of "charges" as used in the now superseded Paragraph 6 of discarded Form 33, and it appears that none is likely to arise.

[4] This form becomes mandatory on all government agencies effective October 1, 1950. See 1 CCH *Government Contracts*, Para. 18305; Federal Supply Service Circular No. 13, dated April 18, 1950.

CONCLUSION

The decision is clearly correct. The questions in the case are of no substantial importance, and the petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
H. G. MORISON,
Assistant Attorney General.
SAMUEL D. SLADE,
JOSEPH KOVNER,
Attorneys.

SEPTEMBER 1950.

APPENDIX

1. OPA Supplemental Order 164, dated June 6, 1946 (11 F. R. 6301), reads in pertinent part as follows:

* * * * *

SECTION 1. *Purpose of this order.* This order permits increases in the sellers' maximum prices for "fluid milk," "cream" and "half-and-half" sold at wholesale and retail to compensate such sellers for the increases in maximum prices payable to producers permitted by Amendment No. 21 to Maximum Price Regulation 329 issued simultaneously herewith.

* * * * *

SEC. 6. *Permitted increases in the maximum prices of "fluid milk."* (a) Any seller of "fluid milk" in the areas defined in section 5 (a) above may increase his maximum prices for such "fluid milk" in effect immediately prior to the issuance of this supplementary order by the following amounts:

(1) For "whole milk," one cent per quart and proportionate amounts for other size containers.

(2) For "fluid milk products" one-half cent per quart and proportionate amounts for other size containers.

SEC. 7. *Permitted increases in the maximum price of "cream" and "half-and-half."* (a) Any seller of cream and half-and-half in all areas designated in paragraph (a) and paragraph (c) through (i) of section 5 above may increase his

maximum prices for such "cream" and "half-and-half" in effect immediately prior to the issuance of this supplementary order by the following amount:

(1) For "cream" one cent per half pint and proportionate amounts for other size containers.

(2) For "half-and-half" one-half cent per half-pint and proportionate amounts for other size containers.

* * * * *

2. Section 2 (a) of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App. 902, reads in pertinent part as follows:

> (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are

generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1950

PETITION

FOR

REHEARING

INDEX

Petition For Rehearing of Order Denying Petition For Writ of Certiorari

	Page
Statement	1
Certificate of Counsel for Petitioner	1
Grounds for Rehearing	2

Brief in Support of Petition For Rehearing

Argument	3
Conclusion	5

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1950

No. 234

CHARLES W. KELLY, TRADING AND DOING BUSINESS AS KELLY DAIRIES,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court:

Statement

This petition for rehearing is filed pursuant to order of the Court entered October 30, 1950 extending the time within which to file it to November 16, 1950.

Certificate of Counsel for Petitioner

Counsel for petitioner hereby certify, pursuant to paragraph 2 of Rule 33 of this Court, that the petition for rehearing is presented in good faith, not for delay, and is restricted to the following grounds enumerated in said Rule.

Grounds for Rehearing

1. Intervening circumstances of substantial effect: Counsel for petitioner were not apprised until filing of Respondent's Brief that the very paragraph of Petitioner's contract and the subject of the controversy, has been superseded and became effective on all Government agencies October 1, 1950. (Respondent's Brief, page 9).

2. Substantial grounds available to petitioner although not previously presented: Petitioner should be afforded opportunity to present the answer to the Government's assertion (Repondent's Brief, page 7) that the increased "charge" in the contract was caused by petitioner's subcontractors and not by action of the Congress as recited in Paragraph 6 of the contract.

Respectfully submitted,

ROBERT F. KLEPINGER,
1720 "M" Street, N. W.
Washington 6, D. C.
Attorney for Petitioner.

GROVER C. THOMPSON,
1st National Bank & Trust Co. Bldg.,
Lexington, Kentucky,
Of Counsel.

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1950

No. 234

CHARLES W. KELLY, TRADING AND DOING BUSINESS AS KELLY DAIRIES,

Petitioner,

v.

THE UNITED STATES,

Respondent.

ON PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR REHEARING

Argument

I.

It is now self-evident that at last the General Accounting Office and all government contracting officers have eliminated from a standard form government contract a provision which for years has misled and occasioned loss to innocent citizens. As rewritten, effective on all government agencies October 1, 1950, the term "charges" is eliminated. (Respondent's Brief, page 9). Thus the

Government in effect gives notice albeit belatedly that although petitioner relied upon the term (the dissenting Judge of the Court below described the situation as entrapment; R. 15; Brief in Support of Petition for Certiorari, pages 8, 9), government contractors will not continue to be misled *after October, 1950.* This, of course, is no comfort to petitioner.

Elimination of the term "charges" confirms precisely the position asserted in Petitioner's Brief in Support of Petition for Writ of Certiorari. Moreover, it is utterly inconsistent with Respondent's argument (Brief, page 8) that petitioner's construction of Paragraph 6 "wrenches the term 'charges' out of context; * * *". Otherwise, what purpose is now served by eliminating the term? The statement in Respondent's Brief (page 9) that there are no other cases pending involving the meaning of the term and that it appears none is likely to arise, is not the answer nor is it persuasive. It must be regarded as speculative because unquestionably many government contracts not yet entirely performed contain the old Paragraph 6. Certainly it cannot be predicted safely that litigation will not arise in the Court of Claims during the six-year period within which suit may be brought. The fact that no *cases* may be pending at this time is no guarantee that none will be instituted before expiration of the statutory period. This uncertainty only emphasizes the reasons for allowance of the writ of certiorari. (Brief for Petitioner, page 4). The conclusion is inescapable that abandonment of the old Paragraph 6 was due to realization it is misleading and imposes injustice and hardship upon those citizens who contract with their government.

II.

Respondent contends (Brief, page 7) that petitioner paid the increase in the price of milk because of his subcontract with suppliers, and not because of an Act of

Congress. The contention is fallacious. Petitioner was obligated to deliver dairy products to a government hospital under his contract. If he had not paid the increased prices to his suppliers authorized by the O. P. A. order issued under an Act of Congress, performance of the contract by delivering those products would have been impossible. Furthermore, petitioner actually received monthly payments during performance for such price increases only to find that upon complete performance the total of those increases were deducted from his final payment voucher.

Conclusion

The construction to be placed upon the controversial paragraph in government contracts should be settled definitely. Unless its meaning is determined finally by this Court, there is no assurance that the problem will not arise even under pending uncompleted government contracts containing the same provision. The conflicting views of the Court below should be resolved. The petition for writ of certiorari should be allowed and the judgment reversed with directions to enter judgment for petitioner.

Respectfully submitted,

ROBERT F. KLEPINGER,
Attorney for Petitioner.

GROVER C. THOMPSON,
Of Counsel.